

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

4 NEREIDA CANCEL DE RUGG,

Plaintiff

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TOGO WEST, Secretary of the Army;
WILLIAM COHEN, Secretary of
Defense; JOHN DOE and RICHARD
DOE,
Defendants

CIVIL 97- 1594 (JAG)

MAGISTRATE'S JUDGE'S REPORT AND RECOMMENDATION

12 This matter is before the court on motion for partial summary judgment filed on
13 June 12, 2000 by plaintiff Nereida Cancel de Rugg (“Cancel”). (Docket No. 76.) Plaintiff
14 moves for partial summary judgment on the grounds that there is no factual disagreement
15 as to defendants’ discriminatory animus regarding her dismissal.(Docket No. 76.) Plaintiff
16 also argues that the actions taken by the defendants ultimately affected and changed the
17 terms and conditions of her employment while working at the San Juan Station Military
18 Entrance Processing Station (“San Juan MEPS”). (Docket No. 76.) On July 10, 2000
19 defendants Togo West, Jr., Secretary of the Army, and Secretary of Defense William
20 Cohen, filed a motion responding to plaintiff’s motion requesting partial summary
21 judgment. (Docket No. 85.) Defendants argue that plaintiff has failed to establish a cause
22 of action under Title VII 42 U.S.C.A. § 2000 e-2(a) and 2000 e-3(a). (Docket No. 85.)

I. Procedural Background

25 In 1980 plaintiff began working for San Juan MEPS as Military Processing Clerk,
26 with the Grade of GS-2. Plaintiff later attained Grade-0204-4, which she maintained for
27 several years until her dismissal on August 2, 1997. Throughout her years at San Juan
28 MEPS, plaintiff's yearly evaluations described her work as highly successful, successful, and

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3 exceptional at times. In early 1994, plaintiff was under supervision of a new rater.
4 Plaintiff's new supervisor issued a Job Expectation Letter in which observations were made
5 as to plaintiff's deficient performance in her duties and her use of her native language,
6 Spanish, at the work place. Plaintiff claims that treatment towards her by her supervisors
7 was harsh. Subsequently, she filed a complaint against San Juan MEPS, denouncing the
8 gender based and national origin discrimination she was receiving from her supervisors at
9 her work place. (Docket No. 1.)

10 In or around September 1995, plaintiff had a new supervisor. Plaintiff claims that
11 she was instantly the target of retaliation from her employer, due to the complaint she filed
12 against her previous supervisor, denouncing harsh treatment and gender and national origin
13 discrimination. As a result, she was subjected to additional duties not assigned to anybody
14 else; she was held to a higher standard than her male co-workers; and was expected to
15 process applicants at an unreasonable rate with no additional compensation or other
16 recognition. During the months of September, 1995 through April, 1996, plaintiff claims
17 she was constantly harassed verbally and was put under inordinate and undue pressure on
18 the job. (Docket No. 1.)

19 On April 22, 1997, plaintiff took action to remedy the national origin and gender-
20 based discrimination of which she had allegedly been a victim while working for MEPS.
21 (Docket No. 1.) Ultimately, this action made plaintiff a target of retaliatory acts from her
22 supervisors, which culminated with plaintiff's dismissal and depravation of her rights
23 secured under Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000 e-2 (a) and 2000 e-
24 3(a). (Docket No. 1.)

25 On April 6, 2000, defendants filed a motion to dismiss in part all of plaintiff's
26 allegations, for failure to state a claim under which relief can be granted under Rule
27 12(b)(6), Federal Rules of Civil Procedure (Docket No. 70.) Defendants also moved for
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3 Summary Judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure (Docket No.

4 70.) On March 11, 2000 the court entered an opinion and order regarding defendants

5 motion to dismiss in part, and for summary judgment. (Docket No. 87.) The court granted

6 summary judgment in favor of defendants as to the sexual harassment charges and as to her

7 14 day suspension from her employment at MEPS, but denied defendants' motion as to

8 the two performance evaluations and her permanent dismissal from her employment.

9 (Docket No. 87.)

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II. Standard

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12 Summary Judgment is entered only when "the pleadings, depositions, answers to

13 interrogatories, and admissions on file, together with the affidavits, if any, show that there

14 is no genuine issue as to any material fact and that the moving party is entitled to a

15 judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S.

16 317, 322 (1986); Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001); see

17 Abbadessa v. Moore Bus. Forms, Inc., 987 F.2d 18, 22 (1st Cir. 1993). To find in favor of

18 the defendants, this court "must view the entire record in the light most hospitable to the

19 party opposing summary judgment, indulging all reasonable inferences in that party's

20 favor." Suárez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000); Griggs-Ryan v. Smith,

21 904 F.2d 112, 115 (1st Cir. 1990); see Pérez v. Volvo Car Corp., 247 F.3d 303, 310 (1st

22 Cir. 2001).

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24 In a motion for summary judgment, the moving party must demonstrate "an absence

25 of evidence to support the nonmoving party's case" to discharge its burden of proof.

26 Celotex Corp. v. Catrett, 477 U.S. at 325. Then the nonmoving party adopts the burden

27 of showing that there is a factual disagreement. "[T]o defeat a properly supported motion

28 for summary judgment, the nonmoving party must establish a trial-worthy issue by

presenting 'enough competent evidence to enable a finding favorable to the nonmoving

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3 party." Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 332 (1st Cir. 1997)
 4 (quoting Leblanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993), cert. denied., 511
 5 U.S. 1018 (1994)). Plaintiff may not rely on "conclusory allegations, improbable
 6 inferences, and unsupported speculation." Pagano v. Frank, 983 F.2d 343, 347 (1st Cir.
 7 1993) (citing Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990));
 8 see Burns v. State Police Ass'n of Mass., 230 F.3d 8, 9 (1st Cir. 2000). Only at this point
 9 does the court construe material facts and reasonable inferences in favor of the non-moving
 10 party. Domínguez v. Eli Lilly & Co., 958 F. Supp. 721, 727 (D.P.R. 1997).

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III. Analysis

12 Title 42 U.S.C.A. § 2000 e-2 (a) states that:

13 " It shall be unlawful employment practice for an employer:
 14 (1) to fail or refuse to hire or to discharge against any individual with respect
 15 to his compensation, terms, conditions, or privileges of employment, because
 16 of such individual's race, color, religion, sex, or national origin;
 17 (2) to limit, segregate, or classify his employees or applicants for employment
 18 in any way which would deprive or tend to deprive any individual of
 19 employment opportunities or otherwise adversely affect his status as an
 20 employee, because of such individual's race, color, religion, sex, or national
 21 origin." 42 U.S.C.A. § 2000 e-2(a).

22 Title 42 U.S.C.A. § 2000 e-3(a) states that:

23 " It shall be unlawful employment practices for an employer to discriminate
 24 against any of his employees ... to discriminate against any
 25 individual...because he has opposed any practice made an unlawful
 26 employment practice by this subchapter, or because [she] has made a charge,
 27 testified, assisted, or participated in any manner in an investigation,
 28 proceeding, or hearing under this subchapter." 42 U.S.C.A. § 2000 e-3(a).

29 In employment discrimination cases, the plaintiff must make a prima facie
 30 case...showing that: (1) she is a member of a protected class; (2) her employer took an
 31 adverse employment action against her; (3) she was qualified for the employment she held;
 32 and (4) her position remained open or was filled by a person whose qualifications were
 33 similar to hers. Straughn v. Delta Air Lines Inc., 250 F.3d 23, 33 (1st Cir. 2001) (quoting
 34 Rodriguez- Cuervos v. Wal-Mart Stores, Inc., 181 F. 3d 15, 19 (1st Cir. 1999); see Rivera-

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3 Rodriguez v. Frito Lay Snacks Caribbean, a Div. of Pepsico Puerto Rico, Inc., 265 F.3d 15,
4 25 (1st Cir. 2001). Once the plaintiff has made out a *prima facie* case, a presumption that
5 the employer unlawfully discriminated against the employee is created and the burden
6 shifts to the employer to articulate a nondiscriminatory reason for the dismissal.
7 Dominguez- Cruz v. Suttle Caribe Inc., 202 F.3d 424,430 (1st Cir. 2000)(quoting St.
8 Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-507(1993). If the defendant meets this
9 burden, the presumption of discrimination created by the *prima facie* case drops away and
10 the burden of production shifts back to the plaintiff to show that the employer's stated
11 nondiscriminatory reason was a pretext for discrimination. Dominguez- Cruz v. Suttle
12 Caribe Inc., 202 F.3d 424, 430 (1st Cir. 2000) (quoting Hicks at 507-508). Obviously,
13 whether in a particular case a *prima facie* showing of discrimination and the disbelieved
14 pretextual explanation make a stronger or weaker case for the plaintiff depends very heavily
15 on the facts. Fite v. Digital Equipment Corp., 232 F. 3d 3, 7 (1st Cir 2000); see also
16 Thomas v. Eastman Kodak Co., 183 F.3d 38, 57-58 (1st Cir. 1999).

17 In order for the plaintiff to succeed in a claim under 42 U.S.C.A. § 2000 e-3(a), the
18 plaintiff must come forward with a *prima facie* case of retaliation. King v. Town of Hanover,
19 116 F. 3d 965, 968 (1st Cir. 1997). To establish a *prima facie* case of retaliation, plaintiff
20 must show: (1) she engaged in protected conduct under Title VII; (2) she suffered an
21 adverse employment action; and (3) a causal connection existed between the protected
22 conduct and the adverse action. Fennell v. First Step Design, Ltd., 83 F. 3d 526, 535 (1st
23 Cir. 1996). After plaintiff has established a *prima facie* case of retaliation, defendant has the
24 burden of showing that the reasons for the adverse employment decision were not
25 discriminatory but rather legitimate. King v. Town of Hanover, 116 F.3d at 968. If
26 defendant does shows legitimate reasons for the actions taken against the plaintiff, then the
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3 former has to show that the reasons set forth by the defendant were in fact pretextual.
4 Fennell v. First Step Design, Ldt., 83 F.3d at 535.
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6 Plaintiff states in the complaint various instances where she claims she was the target
7 of retaliatory actions by her supervisors. First, she claims that she was denied an initial
8 counseling that is required by the Army Regulations; she argues that she was not provided
9 with a written performance plan, which is required by the Total Army Performance
10 Evaluation System; and lastly, she argues that she was performing extra duties not assigned
11 to anybody else without any additional compensation or other recognition. (Docket No.
12 1.) Plaintiff argues that in all her years at the San Juan MEPS she has never had any
13 problems concerning her performance or behavior in the work place, until she was under
14 supervision from her new supervisors. (Docket No. 76.)

15 Plaintiff engaged in a protected conduct under Title VII when she filed an E.E.O.
16 complaint against San Juan MEPS denouncing being the victim of harsh treatment by her
17 supervisors, which resulted in gender-based and national origin discrimination and
18 retaliation against her. (Docket No. 1.) Plaintiff suffered an adverse employment action
19 when she was terminated from her position at San Juan MEPS. Although plaintiff engaged
20 in a protected conduct and suffered from an adverse employment action, there is
21 controversy as to the connection between the two.

22 Defendants claim that plaintiff's dismissal was based on her poor performance while
23 working at the Entrance Processing Station at MEPS and not because of their
24 discriminatory animus against her. (Docket No. 85.) Defendants argue that plaintiff's
25 performance was unsatisfactory and had declined, in spite of her previous positive
26 evaluations. (Docket No. 85.) Defendants also argue that plaintiff has failed to establish
27 a prima facie case of discrimination against them. (Docket No. 85.) Plaintiff claims that
28 defendants' reasons for dismissing her were purely pretextual. (Docket No. 76.) In her

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motion, plaintiff states that defendants did not fully appreciate her work and consequently suffered for it by her being dismissed permanently from her position. (Docket No. 76.) The record also indicates that plaintiff performed all her duties in a more than satisfactory manner throughout all her years at San Juan MEPS. (Docket No. 76.)

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Although plaintiff is a Puerto Rican woman, who was terminated from her job and qualified for the position she occupied at the San Juan MEPS, there is controversy as to whether she was discriminated against and dismissed from her position due to her gender and national origin. As to the claims of retaliation, plaintiff has failed to establish a causal connection between the protected conduct and the adverse action taken against her by her supervisors. Ramos v. Roche Products, Inc., 936 F. 2d 43, 49 (1st Cir. 1991).

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In this case, there is sufficient evidence to establish a genuine issue of material facts regarding the reason for plaintiff's dismissal from her employment at MEPS, except with regards to retaliation. In view of the above, I recommend that plaintiff's motion for partial summary judgment be DENIED. As to claims under Title VII 42 U.S.C.A. § 2000 e-3(a), I recommend that they be DISMISSED, for failure to state a claim under which relief can be granted.

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Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Secretary of Health & Human Servs., 836 F.2d 4,

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6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

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At San Juan, Puerto Rico, this 1st day of November, 2001.

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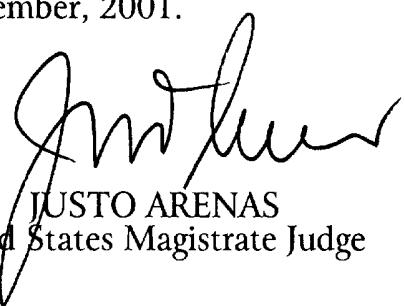
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JUSTO ARENAS
United States Magistrate Judge